

CANADA

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

NO: 500-06-000504-106

(Class Action)  
SUPERIOR COURT

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**C. FOGELMAN**

*Petitioner*

-vs.-

**SONY CORPORATION**, legal person duly incorporated, having its head office at 1-7-1 Konan, Minato-ku, Tokyo, 108-0075, Japan

and

**SONY OF CANADA LTD.**, legal person duly incorporated, having its head office at 115 Gordon Baker Road, Toronto, Ontario, M2H 3R6

and

**SONY CORPORATION OF AMERICA**, legal person duly incorporated, having its head office at 550 Madison Avenue, 27<sup>th</sup> Floor, New York, New York, 10022

and

**SONY OPTIARC, INC.**, legal person duly incorporated, having its head office at 4-16-1 Okata, Atsugi-shi, Kanagawa, 243-0021, Japan

and

**SONY OPTIARC AMERICA INC.**, legal person duly incorporated, having its head office at 1730 N. 1st Street, San Jose, California, 95112, USA

and

**SONY NEC OPTIARC, INC.**, legal person duly incorporated, having its head

office at 4-16-1 Okata, Atsugi-shi,  
Kanagawa, 243-0021, Japan

and

**TOSHIBA CORPORATION**, legal person  
duly incorporated, having its head office  
at 1-1 Shibaura, 1-chrome, Minato-ku,  
Tokyo, 105-8001, Japan

and

**TOSHIBA AMERICA CONSUMER  
PRODUCTS, LLC**, legal person duly  
incorporated, having its head office at 82  
Totawa Road, Suite 1, Wayne, New  
Jersey, 07470

and

**TOSHIBA OF CANADA LIMITED**, legal  
person duly incorporated, having its head  
office at 191 McNabb Street, Markham,  
Ontario, L3R 8H2

and

**SAMSUNG ELECTRONICS COMPANY,  
LTD.**, legal person duly incorporated,  
having its head office at Samsung Main  
Building, 250, Taepyeongno 2-ga, Jung-  
gu, Seoul, 100-742, Korea

and

**SAMSUNG ELECTRONICS AMERICA  
INC.**, legal person duly incorporated,  
having its head office at 105 Challenger  
Road, Ridgefield, New Jersey, 07660-  
2100

and

**SAMSUNG ELECTRONICS CANADA  
INC.**, legal person duly incorporated,  
having its head office at 55 Standish



Court, 10<sup>th</sup> Floor, Mississauga, Ontario,  
L5R 4B2

and

**TOSHIBA SAMSUNG STORAGE  
TECHNOLOGY CORPORATION**, legal  
person duly incorporated, having its head  
office at 1-1 Shibaura, 1-chrome, Minato-  
ku, Tokyo, 105-8001, Japan

and

**HITACHI, LTD.**, legal person duly  
incorporated, having its head office at 6-  
6, Marunouchi 1-chrome, Chiyoda-ku,  
Tokyo, 100-8280, Japan

and

**HITACHI CANADA, LTD.**, legal person  
duly incorporated, having its head office  
at 2495 Meadowpine Boulevard,  
Mississauga, Ontario, L5N 6C3

and

**HITACHI AMERICA LTD.**, legal person  
duly incorporated, having its head office  
at 2000 Sierra Point Parkway, Brisbane,  
California, 94005-1835

and

**LG ELECTRONICS, INC.**, legal person  
duly incorporated, having its head office  
at LG Twin Towers, 20, Yeouido-dong,  
Yeongdeungpo-gu, Seoul, 150-721,  
South Korea

and

**LG ELECTRONICS CANADA**, legal  
person duly incorporated, having its head  
office at 550 Matheson Boulevard East,  
Mississauga, Ontario, L4Z 4G3

and

**LG ELECTRONICS USA, INC.**, legal person duly incorporated, having its head office at 1000 Sylvan Avenue, Englewood Cliffs, New Jersey, 07632

and

**HITACHI-LG DATA STORAGE, INC.**, legal person duly incorporated, having its head office at 4F MSC Center Building, 22-23, Kaigan 3-chrome, Minato-Ku, Tokyo, 108-0022, Japan

and

**KONINKLIJKE PHILIPS ELECTRONICS N.V.**, legal person duly incorporated, having its head office at Groenewoudseweg 1, Eindhoven 5621 BA, The Netherlands

and

**PHILIPS ELECTRONICS NORTH AMERICA CORPORATION**, legal person duly incorporated, having its head office at 1251 Avenue of the Americas, New York, New York, 10020

and

**PHILIPS CANADA LTD.**, legal person duly incorporated, having its head office at 281 Hillmount Road, Markham, Ontario, L6C 2S3

and

**LITE-ON IT CORPORATION**, legal person duly incorporated, having its head office at 12-15F, 392 Jui Kuang Road, Taipei City, TAP 11492, Taiwan



and

**PHILIPS & LITE-ON DIGITAL SOLUTION CORPORATION**, legal person duly incorporated, having its head office at 16F, 392 Jui Kuang Road, Taipei City, TAP 11492, Taiwan

and

**PHILIPS & LITE-ON DIGITAL SOLUTIONS USA, INC.**, legal person duly incorporated, having its head office at 42000 Christy Street, Fremont, California, 94538

and

**NEC CORPORATION**, legal person duly incorporated, having its head office at 7-1, Shiba 5-chrome, Minato-ku, Tokyo, 108-8001, Japan

and

**NEC ELECTRONICS AMERICA, INC.**, legal person duly incorporated, having its head office at 2880 Scott Boulevard, Santa Clara, California, 95050-2554

and

**TEAC CORPORATION**, legal person duly incorporated, having its head office at 1-47 Ochiai, Tama-shi, Tokyo, 206-8530, Japan

and

**TEAC AMERICA, INC.**, legal person duly incorporated, having its head office at 7733 Telegraph Road, Montebello, California, 90640

and

**TEAC CANADA LTD.**, legal person duly incorporated, having its head office at 5939 Wallace Street, Mississauga, Ontario, L4Z 1Z8

*Respondents*

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**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION  
&  
TO ASCRIBE THE STATUS OF REPRESENTATIVE  
(Art. 1002 C.C.P. and following)**

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TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,  
SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER  
STATES AS FOLLOWS:

**I. GENERAL PRESENTATION**

**A) THE ACTION**

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:
  - all residents in Canada who purchased used, and/or received an Optical Disk Drive (“ODD”) or purchased any products which contain an ODD, since approximately January 2001 through to the present, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who purchased used, and/or received an Optical Disk Drive (“ODD”) or purchased any products which contain an ODD, since approximately January 2001 through to the present, or any other group to be determined by the Court;
2. Optical Disk Drives include CD, DVD, and Blu-ray drives, and are frequently used in personal computers, video game consoles, and other electronics;
  3. Petitioner contends that the Respondents colluded to fix, raise, maintain and stabilize artificially the price at which ODDs were sold, thereby restricting and/or eliminating any competition;



4. By reason of this unlawful conduct, Petitioner and the members of the class have paid higher prices for ODDs and products containing ODDs than they would have paid in a competitive market, causing damages upon which they wish to claim;

## **B) THE RESPONDENTS**

### **HITACHI**

5. Respondent Hitachi, Ltd (“Hitachi”) is a Japanese company. Respondents Hitachi Canada, Ltd. (“Hitachi Canada”) and Hitachi America Ltd. (“Hitachi America”) are subsidiaries of Hitachi. These Respondents being collectively referred to as “Hitachi”. Given their close ties, they are all solidarily liable for their acts and omissions of each other;
6. During the relevant period, Respondents Hitachi manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

### **LG**

7. Respondent LG Electronics, Inc. (“LG”) is a Korean company. Respondents LG Electronics Canada (“LG Canada”) and LG Electronics USA, Inc. (“LG America”) are subsidiaries of LG. These Respondents being collectively referred to as “LG”. Given their close ties, they are all solidarily liable for their acts and omissions of each other;
8. During the relevant period, Respondent LG manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

### **HITACHI-LG DATA STORAGE INC. (“Hitachi-LG”)**

9. Respondent Hitachi-LG is a Japanese and Korean Company. It is a joint venture between the Respondents Hitachi and LG. Hitachi owns 51% of the stock in Hitachi-LG and LG owns the remaining 49%. Between 2001 and 2005 Hitachi-LG sold over 170 million Optical Disk Drives worldwide, generating approximately \$5.5 billion in total revenues;
10. During the relevant period, Respondent Hitachi-LG manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;



## **SAMSUNG**

11. Respondent Samsung Electronics Company Ltd. (“Samsung”) is a South Korean company. Respondents Samsung Electronics Canada Inc. (“Samsung Canada”) and Samsung Electronics America Inc. (“Samsung America”) are subsidiaries of Samsung. These Respondents being collectively referred to as “Samsung”. Given their close ties, they are all solidarily liable for their acts and omissions of each other;
12. During the relevant period, Respondents Samsung manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

## **TOSHIBA**

13. Respondent Toshiba Corporation (“Toshiba”) is a Japanese company. Respondents Toshiba of Canada Limited (“Toshiba Canada”) and Toshiba America Consumer Products, LLC (“Toshiba America”) are subsidiaries of Toshiba. These Respondents being collectively referred to as “Toshiba”. Given their close ties, they are all solidarily liable for their acts and omissions of each other;
14. During the relevant period, Respondents Toshiba manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

## **TOSHIBA SAMSUNG STORAGE TECHNOLOGY CORPORATION (“Toshiba Samsung”)**

15. Respondent Toshiba Samsung is a Japanese company. It is a joint venture between the Respondents Toshiba and Samsung. Toshiba owns 51% of the stock in Toshiba Samsung and Samsung owns the remaining 49%;
16. During the relevant period, Respondent Toshiba Samsung manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

## **SONY**

17. Respondent Sony Corporation (“Sony”) is a Japanese company. Respondents Sony of Canada Ltd. (“Sony Canada”) and Sony Corporation of America (“Sony America”) are subsidiaries of Sony. These Respondents



being collectively referred to as “Sony”. Given their close ties, they are all solidarily liable for their acts and omissions of each other;

18. During the relevant period, Respondents Sony manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

## **PHILIPS**

19. Respondent Koninklijke Philips Electronics N.V. (“Philips”) is a Netherlands company. Respondents Philips Canada Ltd. (“Philips Canada”) and Philips Electronics North America Corporation (“Philips America”) are subsidiaries of Philips. These Respondents being collectively referred to as “Philips”. Given their close ties, they are all solidarily liable for their acts and omissions of each other;

20. During the relevant period, Respondents Philips manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

## **NEC**

21. Respondent NEC Corporation (“NEC”) is a Japanese company. Respondent NEC Electronics America, Inc. (“NEC America”) is a subsidiary of NEC. These Respondents being collectively referred to as “NEC”. Given their close ties, they are all solidarily liable for their acts and omissions of each other;

22. During the relevant period, Respondents NEC manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

## **TEAC**

23. Respondent TEAC Corporation (“TEAC”) is a Japanese company. Respondents TEAC Canada Ltd. (“TEAC Canada”) and TEAC America, Inc. (“TEAC America”) are subsidiaries of TEAC. These Respondents being collectively referred to as “TEAC”. Given their close ties, they are all solidarily liable for their acts and omissions of each other;

24. During the relevant period, Respondents TEAC manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;



**LITE-ON IT CORPORATION** (“Lite-On”)

25. Respondent Lite-On is a Taiwanese company;
26. During the relevant period, Respondent Lite-On manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

**PHILIPS & LITE-ON DIGITAL SOLUTION CORPORATION** (“Philips & Lite-On”)

27. Respondent Philips & Lite-On is a joint venture between Philips and Lite-On;
28. During the relevant period, Respondent Philips & Lite-On manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

**PHILIPS & LITE-ON DIGITAL SOLUTION USA, INC.** (“Philips & Lite-On USA”)

29. Respondent Philips & Lite-On USA is an American company;
30. During the relevant period, Respondent Philips & Lite-On USA manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

**SONY OPTIARC INC.** (“Sony Optiarc”)

31. Respondent Sony is a Japanese company. It is a wholly owned subsidiary of Respondent Sony and the parent corporation of Respondent Sony Optiarc America, Inc. Prior to 2008, when NEC Corporation sold its interest to Sony, Sony Optiarc was known as Sony NEC Optiarc Inc., a joint venture between Sony and NEC Corporation. In 2008, Sony Optiarc reported revenues of \$1.52 billion;
32. During the relevant period, Respondent Sony Optiarc manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

**SONY NEC OPTIARC INC.** (“Sony NEC”)

33. Respondent Sony NEC was a Japanese company. It was created on April 3<sup>rd</sup> 2006 as a joint venture between Respondents Sony and NEC in which Sony



had a 55% interest and NEC had a 45% interest. Respondent Sony purchased NEC's interest in Sony NEC in 2008 and renamed it Sony Optiarc, Inc.;

34. During the relevant period, Respondent Sony NEC manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

**SONY OPTIARC AMERICA INC.** ("Sony Optiarc America")

35. Respondent Sony Optiarc America is an America company. It is a wholly owned subsidiary of Respondent Sony Optiarc;
36. During the relevant period, Respondent Sony Optiarc America manufactured, marketed, sold and/or distributed ODDs and products that contain ODDs to consumers throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, affiliates, and/or subsidiaries;

**AGENTS**

37. Respondents' conduct was authorized, ordered, or done by Respondents' officers, agents, employees, or representatives while actively engaged in the management and operations of the respective Respondents' business;
38. Each Respondent acted as the principal agent, joint venturer of, or for other Respondents with respect to the acts, violations and common course of conduct as alleged herein;

**C) THE SITUATION**

**BACKGROUND**

39. ODDs were invented in 1972 by Sony and Philips. In 1978, both companies agreed on a single format and disc error correction method. The compact disc system (or audio CD) entered the Japanese and European markets in 1982;
40. Once standardized CD specifications were established, the popularity of CDs, and the drives that played them, increased dramatically. By the 1990s, CD-ROM drives were a common feature in computers. This was followed up by creating ODDs for computers that could read and write DVDs and more recently with Blu-Ray discs which hold more data than a CD-ROM;



41. Today, Optical Discs come in four (4) capacity sizes: 700 MB, 4.7 GB, 25 GB Single Layer, and 50 GB Dual Layer. Some ODDs are capable of writing and rewriting data onto a recordable disc (e.g. CD-R, DVD-R, or BD-R);
42. ODDs are contained in many consumer appliances such as video game consoles, CD players, CD-ROMs, CD-Rs, DVD players, DVD recorders, and other electronic devices;
43. ODDs come in two (2) sizes: half height, which use older technology and comprise a smaller share of the market. Half height ODDs are most commonly used in desktop computer towers and tend to be thicker. Slim ODDs are most commonly used in laptop computers;
44. Between 2004 and 2008, worldwide ODD shipments were estimated to have generated over \$45 billion in revenues;
45. In the early 2000s, ODDs were mainly used in personal computers, but by 2005, video games became a larger part of the market. Prices for ODDs declined sharply from 2000 until 2005, but as ODDs became more widely used in video game consoles, pricing began to stabilize. Since 2005, the rate of price decline of ODDs has been slowing. Between 2001 and 2005, the rate of price decline for ODDs was approximately 15%; between 2005 and the present, the rate of decline is approximately 3-4%;

## **THE ODD INDUSTRY**

46. In the face of shrinking profits from ODDs, Respondents colluded to fix, raise, maintain, and stabilize the price of ODDs at artificially inflated and anticompetitive levels in order to preserve and increase their revenues;
47. The ODD industry has several characteristics that facilitate collusion, including: market concentration, ease of information sharing, multiple interrelated business relationships, significant barriers to entry, and homogeneity of products;

### **Market Concentration**

48. During the relevant period, the ODD industry has been dominated by a relatively small number of companies;
49. Respondent Hitachi-LG, which is a joint venture of Respondents Hitachi and LG, established itself as the industry's top manufacturer with an overall annual market share of between 25% and 30% of shipments;



50. Respondent Toshiba Samsung, a joint venture formed in 2004 by Respondents Toshiba and Samsung, is the second largest ODD manufacturer in the world with an annual market share in excess of 20%;
51. In 2008, Respondents Hitachi-LG, Toshiba Samsung, and Sony Optiarc were among the largest producers of ODDs in the world, with a combined market share of 67%;
52. Respondents' dominance and control over the ODD market allowed them to collude to fix the price of ODDs and products that contain ODDs;

### **Joint Ventures**

53. Respondents, in an effort to achieve market dominance, formed several joint ventures, used cross licensing agreements, and were involved in long-standing business relationships – all of which, gave them continuous opportunities to discuss pricing, capacity utilization, and other important prospective market information;
54. The first of these joint ventures was Hitachi-LG, which began operations in January 2001. In April 2004, Toshiba and Samsung consolidated their ODD divisions to form Toshiba Samsung. Between 2006 and 2008, Sony Optiarc and NEC Corporation entered into the ODD joint venture to form Sony NEC;

### **Trade Associations and Business Organizations**

55. During the relevant period, Respondents belonged to trade associations and business organizations that focused on the ODD industry - such as the DVD Forum, the International Symposium of Optical Memory ("ISOM"), and the Optical Storage Technology Association ("OTSA");
56. Membership in these organizations provided the Respondents with countless opportunities to meet and discuss pricing, capacity utilization, and other important prospective market information;

### **Product Homogeneity**

57. ODD are completely interchangeable. As a result, buyers of ODDs and products that contain ODDs make their decisions based largely on price;
58. The Respondents achieved this fungibility of ODDs through their participation in various standard-setting organizations, which paved the way for their collusive behaviour – such as the Optical Storage Technology Association, the International Standardization Organization ("ISO"), and the International Electrotechnical Organization ("IEC");



59. The ODD industry is also subject to patents and intellectual property rights, which has also aided in the effort to ensure interchangeability of ODDs, as the owners of these patents actively require licensees to adopt standard product specifications;

### **Barriers to Entry**

60. There are significant manufacturing and technological barriers to enter into the ODD market. In order to compete in the industry, companies must come up with hundreds of millions of dollars for research and development, licensing, and manufacturing of products;

61. Since the Respondents hold the patents for various technologies necessary to manufacture ODDs, combined with the Respondents' large market share – it has allowed them to dictate who enters the market and at what cost. These barriers have rendered it nearly impossible for smaller manufacturers of ODDs to compete;

62. It is this financial structure that has allowed the Respondents to implement their collusion by eliminating competition and artificially stabilizing the prices for ODDs without losing market share;

### **D) THE FOREIGN PROCEDURES**

63. In October 2009, the United States Department of Justice (“DOJ”) acknowledged that it had commenced an investigation into the anticompetitive conduct in the ODD industry. Some of the Respondents have received subpoenas served on them by the DOJ;

64. Also, some of the Respondents are under investigation by the European Union and Singapore regulators with respect to their ODD units;

65. As well, at least eight (8) class action actions have been instituted in the United States based on the Respondents' conduct, the whole as appears more fully from a copy of said complaints, produced herein *en liasse* as **Exhibit R-1**;

### **E) THE FAULT**

66. To formalize their agreement, combination, collusion, and/or conspiracy, Respondents:

- a. Participated in meeting and conversations to discuss prices and supply of ODDs;



- b. Communicated in writing and/or orally to fix prices of ODD Products;
- c. Agreed to manipulate prices and supply of ODDs in a manner that deprived purchasers of free and open competition;
- d. Issued price announcements and price quotations in accordance with the agreements reached;
- e. Sold ODDs and products containing ODDs to customers in Canada, including the province of Quebec, at non-competitive prices;
- f. Exchanged competitively-sensitive information in order to facilitate their collusion; and
- g. Agreed to maintain or lower production capacity;

67. The predominate purpose of the Respondents' conduct was :

- (i) To harm the Petitioner and members of the class by requiring them to pay artificially high prices for ODDs and products which contain ODDs; and
- (ii) To unlawfully increase their profits on the sale of ODDs and products which contain ODDs;

68. The Canadian subsidiaries of the foreign Respondents participated in and furthered the objectives of the collusion by knowingly modifying their competitive behaviour in accordance with instructions received from their respective parent companies and thereby acted as agents in carrying out the collusion and are therefore liable for such acts;

69. Petitioner contends that the Respondents failed in their duties, both legal and statutory, notably with respect to sections 45 and 46 (1) of the Federal *Competition Act*, thereby rendering them liable to pay damages under section 36 of the Federal *Competition Act*;

70. In addition, Petitioner alleges that the Respondents failed in their obligations as provided for in the *Civil Code of Quebec*, more specifically with respect to the duty to act in good faith and to not cause damage to others;

## II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

71. Petitioner purchased in Quebec over the last few years numerous ODDs and products that contain ODDs, including but not limited to:



- Toshiba Laptop Computer
- Sony Vaio Laptop Computer
- Sony Play Station 3
- Samsung Blu-Ray Player
- Sony Blu-Ray Player
- Toshiba DVD Player
- Philips DVD Player
- External Toshiba Disc Drive

72. Due to the Respondents' conduct, Petitioner was deprived of the benefit of free market competition, and because of this, he was charged a higher price for the products that he purchased;

73. Petitioner has suffered damages in the amount of the difference between the artificially inflated price that he paid for said products and the price that he should have paid in a free market system;

74. The conduct of the Respondents was kept a secret and was not known to the Respondent at the time that he purchased said products nor could it have been discovered, even through the exercise of reasonable diligence;

75. Petitioner has since discovered that this situation is being investigated by the United States Department of Justice and that several class actions have been instituted in the United States due to this issue;

76. Petitioner's damages are a direct and proximate result of the Respondents' conduct;

77. In consequence of the foregoing, Petitioner is justified in claiming damages;

### **III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP**

28. Every member of the class purchased, used, or received an ODD or products which contain ODDs;

29. Each member of the class has paid an artificially inflated price for their ODD products due to the collusion in the industry and its impact on competition;

30. Every member of the class has suffered damages equivalent to the difference between the artificially inflated price that they paid for ODDs and/or products which contain ODDs and the price that they he should have paid in a free market system;



31. All of the damages to the class members are a direct and proximate result of the Respondents' conduct;
32. In consequence of the foregoing, members of the class are justified in claiming damages;

#### **IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION**

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical
33. Products containing ODDs are widespread in Quebec and Canada;
  34. Petitioner is unaware of the specific number of persons who purchased ODDs and/or products which contain ODDs, however, given their tremendous use in a variety of electronic products, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
  35. Class members are numerous and are scattered across the entire province and country;
  36. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of Respondents would increase delay and expense to all parties and to the court system;
  37. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;
  38. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;
  39. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;
- B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondents and that which the Petitioner wishes to have adjudicated upon by this class action



40. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
41. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;
42. The recourses of the members raise identical, similar or related questions of fact or law, namely:
- a. Did the Respondents engage in an agreement, combination, collusion, and/or conspiracy to fix, raise, maintain, or stabilize the prices of ODDs?
  - b. Did the Respondents take any actions to conceal this unlawful agreement, combination, collusion, and/or conspiracy?
  - c. Did the Respondents' conduct cause the prices of ODDs to be sold at artificially inflated and non-competitive levels?
  - d. Were members of the class prejudiced by the Respondents' conduct, and, if so, what is the appropriate measure of these damages?
  - e. Are members of the class entitled to, among other remedies, injunctive relief, and, if so, what is the nature and extent of such injunctive relief?
  - f. Are the Respondents liable to pay compensatory, moral, punitive and/or exemplary damages to member of the class, and, if so, in what amount?
43. The interests of justice favour that this motion be granted in accordance with its conclusions;

## **V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT**

44. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages;
45. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioner and each of the members of the class;



DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

ORDER the Defendants to permanently cease from continuing or maintaining the agreement, combination, collusion, and/or conspiracy alleged herein;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

A) The Petitioner requests that he be attributed the status of representative of the Class

46. Petitioner is a member of the class;

47. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;

48. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;



49. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;
50. Petitioner, with the assistance of his attorneys, are ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;
51. Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other class members, recognized and protecting so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;
52. Petitioner understands the nature of the action;
53. Petitioner's interests are not antagonistic to those of other members of the class;
- B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal
54. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;
55. The Petitioner's attorneys practice their profession in the judicial district of Montreal;
56. The present motion is well founded in fact and in law.

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the present motion;

**AUTHORIZE** the bringing of a class action in the form of a motion to institute proceedings in damages;

**ASCRIBE** the Petitioner the status of representative of the persons included in the class herein described as:

- all residents in Canada who purchased used, and/or received an Optical Disk Drive ("ODD") or purchased any products which contain an ODD, since approximately January 2001 through to the present, or any other group to be determined by the Court;

Alternately (or as a subclass)



- all residents in Quebec who purchased used, and/or received an Optical Disk Drive (“ODD”) or purchased any products which contain an ODD, since approximately January 2001 through to the present, or any other group to be determined by the Court;

**IDENTIFY** the principle questions of fact and law to be treated collectively as the following:

- a. Did the Respondents engage in an agreement, combination, collusion, and/or conspiracy to fix, raise, maintain, or stabilize the prices of ODDs?
- b. Did the Respondents take any actions to conceal this unlawful agreement, combination, collusion, and/or conspiracy?
- c. Did the Respondents’ conduct cause the prices of ODDs to be sold at artificially inflated and non-competitive levels?
- d. Were members of the class prejudiced by the Respondents’ conduct, and, if so, what is the appropriate measure of these damages?
- e. Are members of the class entitled to, among other remedies, injunctive relief, and, if so, what is the nature and extent of such injunctive relief?
- f. Are the Respondents liable to pay compensatory, moral, punitive and/or exemplary damages to member of the class, and, if so, in what amount?

**IDENTIFY** the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

ORDER the Defendants to permanently cease from continuing or maintaining the agreement, combination, collusion, and/or conspiracy alleged herein;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;



CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

**DECLARE** that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

**FIX** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

**ORDER** the publication of a notice to the members of the class in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the NATIONAL POST;

**ORDER** that said notice be available on the various Respondents' various websites with a link stating "Notice to Optical Disk Drive ("ODD") users";

**RENDER** any other order that this Honourable court shall determine and that is in the interest of the members of the class;

**THE WHOLE** with costs including publications fees.

Montreal, April 7, 2010

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Me Jeff Orenstein  
CONSUMER LAW GROUP INC.  
Attorneys for the Petitioner

